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The WTO, International Trade and Environmental Protection:
European and American Perspectives

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Robert Schuman Centre for Advanced Studies

BP Chair in Transatlantic Relations

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INTRODUCTION¹

This essay explores areas of agreement and disagreement between the US and the EU concerning the role of the World Trade Organization (WTO) in linking trade liberalization and environmental protection. It begins by tracing the background of the responses of the General Agreement on Tariffs and Trade (GATT) and the WTO to criticisms from environmentalists. After exploring the common interests of the EU and the US, it then explains the evolution of the American position with respect to trade and environmental linkages over the last decade. The main part of the paper examines a number of areas in which American and European perspectives and preferences have become increasingly divergent.

In brief, while the EU has become increasingly concerned about the tension between WTO rules and environmental regulation, the United States has become less persuaded of the need to change WTO rules; rather it prefers to rely upon the dispute settlement process to balance trade liberalization and environmental protection. Within the Committee on Trade and Environment (CTE) and at the ministerial meetings in Singapore and Seattle, the EU has urged clarification of WTO rules governing the legal status of international environmental agreements, the precautionary principle, eco-labeling and the use of trade restrictions based on process and production methods (ppms) unrelated to the product itself. The US does not consider these clarifications necessary and fears that any rule changes will either make future trade liberalization more difficult or legitimate eco-protectionism. The US and the EU also differ on the phasing out of “environmentally-harmful” subsidies; the former has been generally more supportive of proposals to reduce or eliminate such subsidies, while the latter has been more critical, though both favor liberalizing trade in environmentally friendly technologies.

The Uruguay Round and the Creation of the CTE

In 1991 an international trade dispute settlement panel found that an American law banning imports of tuna caught in ways that harmed dolphins violated American obligations under the GATT, the predecessor organization to the WTO. The environmental community in both the US and the EU was outraged by the panel decision. They urged that the GATT be changed so as to give governments wider latitude to maintain environmental regulations that restricted the imports of products produced in environmentally harmful ways. This highly controversial tuna-dolphin decision launched a decade-long, often heated debate over the compatibility of international trade rules (and their interpretation by

dispute settlement panels) with environmental protection at the national, regional and international levels.²

In marked contrast to the North American Free Trade Agreement, whose approval by Congress in November 1993 incorporated a number of provisions favored by environmental organizations, the Uruguay Round agreement which concluded in 1994 addressed few of the principal concerns of the environmental community. But it did address some of them. For example, the term “sustainable development” which had been an important focus of the 1992 U. N. Conference on Environment and Development (the Rio “Earth Summit”) was mentioned in the first preambular clause of the agreement which formally established the WTO. Also, the Agreement on Technical Barriers to Trade (TBT), which was incorporated into the WTO in order to restrict the use of non-tariff trade barriers, marked the first use of the word “environment.” The TBT’s preamble affirmed the right of each signatory “to maintain standards and technical regulations for the protection of human, animal, and plant life and health and of the environment.” In addition, it contained language that assured countries of their ability to set technical standards (which include environmental regulations) “at the levels they “consider(ed) appropriate,” a clause intended to discourage nations from harmonizing standards downward.³

Responding to pressures from consumer activists, the United States successfully demanded a modification of the Standards Code. While an earlier draft had required that standards be “the least trade restrictive available,” the final version imposed a less formidable hurdle. It stated that they may “not be more trade-restrictive than necessary to fulfill a legitimate objective, taking into account the risks nonfulfillment would create.”⁴ In addition, the Agreement on Subsidies and Countervailing Measures permitted governments to subsidize up to the twenty percent of one-time capital investments to meet new environmental requirements, provided that subsidies were “directly linked and proportionate” to environmental improvements. This provision provided a partial exemption for environmental subsidies from the WTO’s broader restrictions on government subsidies of business.

Most importantly, at the initiative of the European Free Trade Association, (EFTA) the WTO agreed to formally place the relationship between trade and environment on its own agenda. Following the tuna/dolphin decision, EFTA members had requested “a rule-based analytical discussion of the interrelationship between trade and environment... to ensure that the GATT system was well equipped to meet the challenges of environmental issues and to prevent disputes by ... interpret(ing) or amend(ing)... certain provisions of the General Agreement.”⁵ Their request was strongly supported by both the United States and the EU. United States Trade Representative (USTR) Mickey Kantor

expressed his support for “engag(ing) the GATT” with a “post-Uruguay Round work program on the environment.”⁶ For the EU, such a program was urgently needed in order to examine the relationship between WTO rules and multilateral environmental agreements (MEAs).

However, this initiative was opposed by developing countries who feared that the consequence of permitting the GATT to address environmental issues would be to expand the basis on which developed countries could restrict imports. Nevertheless, there was a strong consensus among most GATT members nations that it was important to review the relationship between the rules governing world trade and both national and global environmental regulations. Consequently, the GATT agreed to convene its Working Group on Environmental Measures and International Trade, which had been established in 1971 but had never met.

At the GATT’s April 1994 ministerial meeting at which the Uruguay Round was formally ratified, and the WTO established, agreement was reached to undertake a systematic review of “trade policies and those trade-related aspects of environmental polices which may result in significant trade effects for its members.”⁷ A Committee on Trade and Environment (CTE) was formed to undertake this task. This committee, which is open to all WTO members, has since met regularly. In addition, both the CTE and WTO Secretariat have convened a number of seminars and high level conferences and issued a series of reports on trade and the environment.

Since 1995, there has been no formal change in WTO rules governing the use of environmental regulations as trade barriers. While the CTE has played a useful role in raising awareness of and promoting discussion of trade/environmental linkages, and has strengthened ties between the WTO and the secretariats responsible for administering international environmental treaties, it has been unable to agree on policy recommendations to submit to the WTO’s membership. This is due to sharp differences among its members. Delegates from developing countries have, if anything, hardened their positions and a number have periodically urged that the committee be disbanded and merged into the Committee on Trade and Development. They have emphatically opposed any change in WTO rules or their interpretation. Many of their concerns are also shared by developed nations which are major exporters of raw materials such as Canada and Australia.

The principle points of conflict on trade and environmental linkages within the WTO are between the EU and the US on one hand, and developing nations on the others.⁸ The former favor both a flexible interpretation of Article XX, which lists the grounds on which trade restrictions are permissible, as well

as making the WTO dispute settlement process more transparent. Both positions are opposed by developing countries who face little or no pressure from domestic NGOs to make the WTO more responsive to environmental concerns and who fear protectionist abuses of any new environmental provisions. The latter's trade policy preferences vis-à-vis the developed world are largely driven by domestic producers who want increased access to developed country markets – access which they see threatened by rich country environmentalists who favor linkages between trade and environmental policies. Support for changing or clarifying WTO rules that govern environmental regulations that restrict trade has emerged primarily from the US and the EU. The positions of the EU and the US are complex: they both want a more open world economy, yet they also want to protect their own relatively strict environmental standards from being challenged as trade barriers.

Common EU and US Positions

As both major exporters and the political architects of the global trading system, the US and the EU favor a more open world economy, which in turn requires rules that restrict non-tariff trade barriers. Indeed both the Standards Code and the Agreement on Sanitary and Phytosanitary Measures (SPS) were included in the Uruguay Round Agreement largely at the insistence of the United States. Many American exporters felt they had been disadvantaged by the unfair application of technical, food and agricultural standards and they wanted such standards to be subject to WTO scrutiny. For its part, the EU has had extensive experience in dealing with the role of regulations and standards as non-tariff barriers (NTBs) in the context of its efforts to establish a single internal market. It has also favored rules that restrict discriminatory NTBs at the international level

Yet both the US and the EU also have an extensive array of health, safety and environmental regulations which they want to be able to protect from challenges through the WTO. Many of these regulations also command strong support from politically influential NGOs. The need to protect such regulations has, if anything become more important in recent years. Due to the increasing criticism of globalization in general and the role of the WTO in particular by activists and their supporters on both sides of the Atlantic, a successful legal challenge or even the threat of a successful legal challenge to a politically salient protective regulation would undermine public support for trade liberalization and the legal principles on which it is based.

Moreover, not all European and American producers benefit from liberal trade policies. In many cases, domestic producers want to maintain protective regulations that restrict or disadvantage imports. Alternatively, some

environmental regulations impose a competitive disadvantage on domestic producers, which then gives the latter an interest in making their foreign competitors comply with them as well. This for example, occurred in the case of American restrictions on CFCs. Once their use was banned in the United States, major American producers supported an international agreement to phase out their worldwide use. The “export” of American or European environmental standards is often also strongly supported by domestic NGOs both because it reduces business opposition to the imposition of stricter domestic regulatory requirements and serves to strengthen environmental standards in other countries. Health, safety and environmental regulations backed by coalitions of NGOs and producers – so called Baptist – bootlegger coalitions - are a common feature of trade politics in the US and Europe.⁹

TRADE AND ENVIRONMENT IN AMERICAN POLITICS

The Domestic Political Impasse

While political support for reforming WTO rules to strike a “greener” balance between free trade and environmental protection is now much stronger in Europe than in the US, this was not always the case. The North American Free Trade Agreement (NAFTA) approved by Congress in 1993, included, at the insistence of President Clinton, a Supplementary Agreement on the Environment (SAE) as well a set of environmental provisions in the trade agreement itself negotiated by the Bush Administration. Widely considered to be the “greenist” trade agreement ever negotiated, NAFTA appeared to represent a model for how to liberalize trade while at the same time safeguarding, even improving, environmental quality. Building upon its precedent, U. S Trade Representative (USTR) Mickey Kantor proposed to Congress in mid-1994 that the American legislation implementing the Uruguay Round WTO agreement include, along with an extension of fast-track negotiating authority for the administration, a commitment to making “trade and the environment” one of seven “principal negotiating objectives” for the US in any future trade agreement.¹⁰

However, several Congressional Republicans whose support had been critical to Congressional approval of NAFTA strongly opposed this formulation. They had agreed to the SAE as a necessary price for the passage of NAFTA, but now the Administration was proposing to elevate the status of the environment to a core provision in any future trade agreement negotiated by the US. To some of them, this went too far. They were particularly upset because the side agreement negotiated by Kantor had included provisions for trade sanctions in the event of non-compliance with some of its environmental provisions, which they regarded as a dangerous precedent. Accordingly, a number of Congressional Republicans, along with important segments of the business

community, insisted that fast-track legislation explicitly exclude any agreement on either labor or environmental standards. The Clinton Administration backed down: when it finally submitted legislation authorizing the renewal of fast-track in the fall of 2000 environmental concerns were muted.

But this in turn outraged many environmentalists and their Congressional Democratic allies. Those environmental groups who had backed NAFTA were disappointed that the Clinton Administration had been unable or unwilling to deliver on its commitment to improve environmental conditions in Mexico and especially along the Mexican-American border. They now insisted on much stronger and more effective linkages between trade liberalization and environmental standards. Accordingly, when fast-track renewal finally came to a vote in the House of Representatives, it received virtually no support from Democratic Representatives and was resoundingly defeated.

The failure of the American Congress to renew fast-track negotiating authority since 1994 has many causes. (The House of Representatives did approve renewal in December 2001). But prominent among them has been the impasse over trade and environment linkages within the Congress. Many Republicans, whose party controlled both Houses of Congress between 1994 and 2000, strongly oppose any such linkage, particularly if it provides for trade sanctions for environmental non-performance; indeed, Representative Philip Crane (R. Ill) has submitted legislation that would limit the US from considering environmental issues in trade negotiations. They fear that environmental “safeguards” are really disguised forms of protectionism and that incorporating them would obviate the purpose of trade liberalization and represent a backdoor way to advance the green agenda.

But many Congressional Democrats are still insisting on effective linkages, including provisions for sanctions. These sharp domestic political differences have in turn made it difficult for the US to take a leadership position with respect to trade and environmental issues before the WTO. Any American proposal to strike a different balance between trade liberalization and environmental protection will be attacked as too strong by Congressional Republicans and their allies in the business community and too weak by Congressional Democrats and their allies on the environmental community. Thus American proposals within the CTE have tended to emphasize procedural rather than substantive issues.

American Initiatives

In a communication from the US on “Trade and Sustainable Development” issued as part of preparations for the 1999 Ministerial Conference in Singapore,

the US proposed that the CTE conduct ongoing reviews of the links between the WTO's "negotiating agenda and the environment and public health."¹¹ These reviews "would identify and discuss issues, but not try to reach conclusions or negotiate these issues in the CTE itself." The US has also encouraged all WTO members to conduct reviews of the potential environmental effects of any trade proposals. Shortly before he left office, President Clinton issued an Executive Order requiring written environmental reviews of major trade agreements. This order institutionalized a practice which had begun with the first Bush Administration's review of the environmental impact of NAFTA and it was reaffirmed by President George W. Bush in April 2001.

The United States has also taken a leadership role within the WTO, especially at the Ministerial meetings in Seattle, in attempting to promote increased transparency and openness. In a Declaration of Principles on Trade and Environment, the US noted that it "has been a staunch advocate for WTO reforms, including greater interaction and exchange of information with the public through the creation of consultative mechanism," adding that "transparency and openness are vital to ensuring public understanding of and support for the WTO and all international institutions."¹² It specifically stressed the need to make the dispute settlement process more public, both by providing the public with enhanced access to documents as well as opening dispute panel hearings to the public. Most significantly, in order to improve the WTO's interaction with NGOs, it has urged that the WTO permit the submissions of amicus briefs, thus enabling environmental organizations to directly communicate their views to dispute panels, rather than having to submit their positions through their national governments.

The WTO has responded to a number of these suggestions. It has invited NGOs to participate in a number of conferences and seminars and has issued a steady stream of studies on the environmental impacts of trade liberalization. The dispute settlement process has also become more public, largely through the internet, which now provides considerably more information on the progress of dispute settlement proceedings. In the shrimp/turtle case, the appellate panel did invite the views of experts in marine biology and it also permitted representations by NGOs, though these were formally part of the American legal brief. These initiatives have been supported by the EU as well, though it has placed less priority on them than has the US.

Since the tuna/dolphin case, environmentalists have been sharply critical of the WTO for both its indifference to the environmental impact of trade policies and the secret and closed nature of its dispute settlement proceedings. Each of these proposals – for more extensive reviews of the environmental impacts of trade policies, greater transparency and expanded public participation

in the WTO – represent an effort on the part of the American government to respond to criticisms of WTO policies and procedures from American environmental NGOs. The Clinton Administration also appeared willing to support more substantive changes in WTO rules to make them more environmentally friendly, but was either unable or unwilling to invest any political capital to achieve such changes, in part because of a lack of Congressional support.

For its part, the Bush Administration, while publicly acknowledging that trade policies should also improve environmental quality, initially opposed any formal linkages between the two. USTR Robert Zoellick cautioned that, “while there are many ways to support international environmental... objectives, you have to be very careful to do so in a way that doesn’t become a form of protectionism,” adding that he shared the concern of developing countries that “this is a new way to slow their growth.”¹³ He also explicitly characterized the trade and environmental agenda as protectionist. However in an attempt at compromise, the fast-track authorization narrowly approved by the House of Representatives in December 2001 did list as one American trade negotiating objective, the need to ensure that trade and environmental objectives are mutually supportive. This legislation also committed the US to seek to ensure that parties to a trade agreement effectively enforced their environmental laws, though it did not specify how this was to be accomplished.

The most important American policy initiative relating to trade and the environment has to do with the highly controversial area of subsidies, specifically in the areas of fisheries and agriculture. The US has long sought to restrict the EU’s extensive agricultural subsidies, particularly its export subsidies, as well as its subsidies for its fishing fleets. Both sets of subsidies adversely affect American producers and American efforts to restrict them long predate the emergence of environmental concerns over international trade. But with the growth of concern about the environmental impact of trade liberalization, the US argued for reducing or restricting these subsidies on the grounds that they are environmentally harmful – a position which is supported by a number of WTO studies and reports.¹⁴

According to the US, “in the agricultural sector, there is overwhelming evidence that extensive use of trade distorting subsidies, and other trade distorting practices, have contributed to the overuse of crop production inputs, social degradation, overgrazing, and other unsustainable practices.”¹⁵ The US wants to build upon the progress made in the Uruguay Round to “transition away” from domestic agricultural subsidies (that) encourage degradation of natural resources and distort trade.” Likewise, the US has identified the extensive financial support of national governments for commercial fishing

fleets and related infrastructure as a major cause of the depletion of global fish stocks. “Subsidy reform in the fisheries sector offers a prime opportunity for taking action in support of trade liberalization.”

More generally, by reducing such trade distorting subsidies, “trade liberalization can promote competition and more efficient resource use, as well as contribute to higher living standards and a cleaner environment.”¹⁶ In a related proposal, the United States supports what it describes as another “win-win” opportunity: the elimination of tariffs on environmental goods, such as pollution control technologies, and the liberalization of trade in environmental services. In short, for the US, the most constructive way to “green” the WTO is not to expand the grounds on which a nation can restrict trade to prevent environmental harms, but rather for the WTO to encourage governments to reduce their financial support for environmentally harmful economic activities.

EU – US DIFFERENCES

Multilateral Environmental Agreements (MEAs)

From the very outset of trade and environmental discussions within the WTO, the EU urged the CTE to recommend that trade restrictions sanctioned by MEAs be protected from challenges through the WTO. Such a change would affect approximately 180 agreements. The EU has been concerned about the possibility that, under current trade law, a country which belonged to the WTO but had not signed an international environmental agreement could legally challenge trade restrictions that were permitted or mandated by an MEA. This would not only “undermine international efforts to tackle environmental problems (but) it would also fuel the arguments of those opposed to the WTO.”¹⁷ While acknowledging that no trade measure taken pursuant to an MEA has yet been challenged in the WTO by a non-party, the EU believes that “the legal ambiguity surrounding the possibilities of such a challenge causes uncertainty and doubt over the effectiveness and legal status of such measures and thus weakens MEAs.” Accordingly, the EU wants the WTO to “clarify that... multilateral environmental agreements and associated trade measures are also respected by trade law.”

The American position is that no such clarification is necessary because “the WTO broadly accommodates trade measures in MEAs.”¹⁸ The US has expressed confidence the WTO would not sustain a challenge to an MEA – a position which it believed to be confirmed by the Appellate Body ruling in the shrimp-turtle case. This case did not technically concern an MEA, since at issue was the US embargo on shrimp caught in ways that killed sea turtles. CITES prohibits trade in sea turtles, not in shrimp. Nor does it provide for trade

restrictions of related products as a means of enforcing its provisions. Nonetheless the fact that the American trade restriction was intended to protect a species protected by an MEA was explicitly noted by the panel.

However these trans-Atlantic differences in part reflect the changing position of the US and the EU with respect to MEAs. Historically, MEAs have reflected a broad international consensus, one which has included both the US and the EU, with the former frequently playing a leadership role. But more recently, such agreements have reflected sharp differences between the two. An important example is the Montreal Protocol on Biodiversity.¹⁹ The EU supported an international treaty that would legitimate its domestic restrictions on the planting, sale and labeling of genetically modified foods and seeds. For its part, the US, as a major exporter of such crops, wanted to limit the basis on which trade in genetically modified foods could be restricted. The two parties specifically differed as to the application of the precautionary principle to import bans and labeling requirements, whether or not the protocol should include bulk commodities intended for consumption i.e., crops, or be limited to seeds, and the relationship between the protocol and WTO rules.

On the critical point of the relationship between the Protocol and WTO, the former is deliberately ambiguous. However, if the US were to bring a claim before the WTO over an EU restriction on genetically modified organisms (GMOs,) the Biosafety Protocol, which has been ratified by more than 130 countries, could be invoked by the EU as evidence of a strong international consensus. (The EU was unable to cite any such international consensus in its defense in the beef hormone case). Whether this would enable the EU to prevail remains unclear, but it certainly would make their case stronger. In this context, it is not surprising that the EU urgently wants the WTO to “clarify” the legal relationship between MEA’s and the WTO in a way that specifies the circumstances under which the former are subject to the latter. The US officially claims that no such clarification is needed because no nation has filed a challenge to a trade restriction sanctioned by an MEA. But clearly the US also wants to avoid having the WTO defer to an MEA, which it does not support – a category, which is steadily expanding.

Precautionary Principle

Within the EU, the precautionary principle has emerged as an important basis for the adoption of a wide range of risk-adverse health, safety and environmental policies, including restrictions on genetically modified foods and seeds. It has been an explicit component of EU environmental policy since 1992 and is defined as one of the key principles of EU environmental law in both the Maastricht and Amsterdam Treaties. In order to better defend its regulations

from possible legal challenges from the US, and other WTO members, the EU wants the precautionary principle to be incorporated into international trade law. One way to accomplish this objective is to include this principle in as many international environmental agreements as possible and then to have these agreements accorded some kind of legal status by the WTO.

For its part, the US wants to maintain the legal supremacy of the SPS Agreement, whose more demanding scientific standards for trade-restrictive regulatory policies enabled the US to prevail in its dispute over the EU's ban on beef hormones.

Not surprising, there were sharp differences between the EU and the US over whether the precautionary principle should be included in the Montreal Protocol on Biodiversity. As a compromise, Article 10 of the Protocol incorporates the precautionary principle though without explicitly mentioning it: a country is permitted to reject the importation of a "living modified organism for intentional introduction into the environment" where there is "lack of scientific consensus" regarding the extent of its the potential adverse effects on either human health or biodiversity. Most observers believe that this language reduces the amount of scientific evidence that would be needed to justify an important ban.

The EU and the US are also divided about the legal status of the precautionary principle in international trade law. During the Uruguay Round negotiations, in the early 1990s it was the United States which had insisted on changes in the SPS Agreement to make it easier for relatively risk-adverse regulatory standards to pass the scrutiny of WTO dispute panels. This position reflected the relative stringency of many American health, safety and environmental standards when compared to the rest of the world, including EU. But over the last decade, the EU has adopted a number of standards which are stricter than their American counter-parts. Accordingly, it is now the EU which is insisting that WTO rules be modified so that they can more easily defend their regulatory standards from trade challenges, including from the US.

One such modification would be for the WTO to accord legal recognition to the precautionary principle – in effect harmonizing EU and WTO approaches to regulatory policy formation in the face of scientific uncertainty. While the European Commission believes that measures based on the precautionary principle are *a priori* compatible with WTO rules, it nonetheless wishes to "clarify this relationship" and, in addition, "to promote the international acceptance of the precautionary principle." According to the EU, "this will help ensure that measures based on a legitimate resort to the precautionary principle, including those that are necessary to promote sustainable development, can be

taken without the risk of trade disputes.”²⁰ In this context, it is worth recalling that the EC did invoke the precautionary principle in the beef hormone case, only to have the Appellate Body decide that “the precautionary principle cannot override our finding... namely that the EU import ban... is not based on risk assessment” as required by the SPS Agreement.²¹ Clearly, the EU would prefer that any trade dispute regarding GMOs be decided on a different basis.

Once again, the US does not consider a change in WTO rules to be necessary. According to the Americans, not only is a “precautionary element... fully consistent with WTO rules, (but) it is as an essential element of the US regulatory system.”²² However the US cautions that “precaution be exercised as part of a science-based approach to regulation, not a substitute for such an approach.” While this is not inconsistent with the way the precautionary principle has been interpreted within the EU, the US remains concerned that, as applied by the EU, there is a danger that the precautionary principle will become a “guise for protectionist measures.” The US is satisfied with provisions of the SPS Agreement which permit a country to set high standards even when the scientific evidence on risk is uncertain, with the stipulation that such standards be regarded as provisional and thus subject to modification as more evidence becomes available. But the US is concerned that “explicitly embedding a precautionary principle in the SPS or TBT sections of the WTO framework would... allow countries to block imports on environmental or health grounds in the absence of any scientific evidence of significant risk.”²³

This issue highlights an important transatlantic difference in approaches to risk management .As one diplomat recently observed, “The Americans say that until the product is proved hazardous, it has to be treated as safe; Europeans say that until the product is proved safe, it’s presumed risky.”²⁴ Underlying these differences is a substantial divergence in recent European and American experiences with food safety issues: European has recently been plagued with a steady stream of food safety crises, ranging from dioxin in animal feed to mad cow and foot and mouth disease. By contrast, few comparable scares have recently emerged in the United States.

Process and Production Methods (PPMs)

Historically, the most important source of trade conflict between the US and its trading partners, including the EU, has stemmed from American efforts to unilaterally employ trade restrictions to impose its domestic environmental policies on other countries. This was the essence of the dispute in both the tuna/dolphin and the shrimp/turtle cases. But while the US lost both cases, including a second tuna/dolphin case which was brought by the EU, the political significance of the two marine protection cases was substantially different.

In the shrimp/turtle case, the WTO's appellate body, in an opinion that sharply contrasted with the dispute panel decision in the tuna/dolphin cases, agreed that the US *could* limit imports on the basis of how a product was produced outside its borders in order to pursue legitimate environmental objectives – provided certain conditions were met. What the WTO objected to was not the goal of American policy but rather the means it had used. This meant that only minor changes were required to make US turtle protection regulations consistent with the WTO. Following these changes, the American regulations were subsequently upheld by another WTO dispute panel.

While many American environmentalists failed to appreciate the significance of appellate body ruling, the US government has not. It regards the outcome of the shrimp/turtle case as a major political triumph: the WTO had effectively revised its legal interpretation of the rules governing one of the most persistent sources of trade conflict between the US and its trading partners.²⁵ The USTR headlined its press release announcing that a second dispute panel had found America's slightly revised implementation of its sea turtle protection law to be fully consistent with the decision of the Appellate Panel, "U.S. Wins on WTO Case in Sea Turtle Conservation." Zoellick commented, "We have long maintained that the WTO Agreements recognize the legitimate environmental concerns of Members, and this report confirms our view. I am pleased that the argument we have made in this and other disputes have contributed to the body of cases illustrating the WTO's sensitivity to environmental concerns."²⁶

The EU was also pleased with the outcome of this case since a number of environmental policies that its trading partners, including the US, have challenged have also revolved around the extra-territorial application of environmental regulations. But the EU does not share America's satisfaction with the extent to which the shrimp/turtle dispute panel decision has "greened" the WTO. It wants WTO rules to be clarified in order to significantly broaden the basis upon which a country can regulate or restrict imports based on how they were produced outside its borders. According to the EU,

It is increasingly clear that how a good is made is important and can no longer be dismissed as a luxury or detail of concern only to developed countries. . . There is a growing list of Product, Production Methods (PPMs) which are not "related" to the product but which are nevertheless considered to be important for scientific (e.g. climate change, ozone depletion, deforestation) or social (consumer choice, societal preferences, animal welfare) reasons or sometimes both. Environmental reasons might include a combination of scientific and social reasons: a PPM which led, say, to the extinction of a particular species in the wild could be argued against on scientific

grounds (because of its role in an ecosystem), as well as on social grounds (its intrinsic value or beauty.)²⁷

The EU's position on the appropriate status of environmentally related trade restrictions under the GATT/WTO has shifted markedly over the last decade. In 1991, the EU, along with virtually every other GATT member, applauded the dispute panel ruling against the US in the tuna/dolphin case for striking a much needed blow against America's unilateral efforts to extend the scope of its environmental standards outside its borders. Now, it is the EU which is in the forefront of urging the WTO to clarify to permit a wide range of environmentally- related trade restrictions to protect the global environment – even in the absence of an international treaty. This change in the EU's position largely reflects its increasingly active leadership role in addressing international environmental issues – a role formerly occupied by the US.

Eco-Labels

A related point of contention between the EU and the US involves the legal status of environmental labels. Both the US and the EU support the use of eco-labels, both for the environmental impact of the product itself as well as for how it is produced. However the use of eco-labels is much more common in Europe, where at both the national and European level they have become a major instrument of environmental policy. The US has periodically expressed concern about the EU's criteria for awarding eco-labels on the grounds that the European system has a “potential for discrimination against US firms whose production processes and methods differ from those used in the EU while having comparable environmental impacts.”²⁸ In one of its annual reports to Congress the USTR listed the EU's eco-label scheme as a “topic of continuing concern,” though to date there has been no consensus within Washington about whether the US should file a formal complaint. Within the USTR's Trade and Environment Public Advisory Committee, views about eco-labels diverge sharply: some NGOs oppose placing any limits on the use of eco-labels, while representatives of industry want to restrict their imposition in an arbitrary fashion. Thus the Committee has been unable to fashion a position.

Within the CTE, the relationship of eco-labels to the WTO has emerged as a major point of contention between the US and the EU. One key issue is their legal status. Specifically, does the Technical Barriers to Trade Agreement (TBT) which covers both technical regulations and standards, include eco-labels? The US claims that it does since the definition of both standards and technical regulations in the TBT explicitly includes “labeling requirements as they apply to a product, process or production method.”²⁹ This would make national, or in the case of the EU, regional, eco-labels subject to the same WTO

discipline as any other technical standard, meaning they would be required to treat products from all WTO member countries equally and could not be prepared, adopted or applied with the intention or effect of creating “unnecessary obstacles to trade.” However, the US has not advocated a change in WTO rules; rather it believes that the TBT is already sufficiently flexible both to protect the use of ecolabels based on ppms as well as to subject them to WTO scrutiny.

The EU initially argued that the TBT does not cover eco-labels at all, a position which it based on the absence of specific references to environmental labels, as distinguished from “labeling requirements” in the TBT. However, as environmental concerns in Europe have grown, the EU’s position has shifted. As in the case of the trade status of MEAs, the EU now wants the relationship between WTO rules and Non-Product Related Process and Production Methods (otherwise known as PPMs) to be “clarified.” It particularly supports explicit recognition of the WTO-compatibility of eco-labeling schemes based on a life-cycle approach. According to the European Commission, “EU consumers are increasingly concerned about a growing range of NPRPPM issues which they feel affect their everyday lives.”³⁰ Accordingly, “subject to... important procedural safeguards, there should be scope within WTO rules to use such market based, non-discriminatory non-protectionist instruments as a means of achieving environmental objectives.”

WTO Dispute Settlement

Underlying the differences between the EU and US views toward modifying WTO rules governing regulatory standards that restrict trade is a divergence in their perceptions of the adequacy of WTO rules and their interpretation by dispute panels. Are these rules and the way they are interpreted adequate to enable the US and the EU to defend health, safety and environmental regulations they regard as legitimate. According to the US, “WTO rules recognize that there can be legitimate differences of view on scientific and technical issues in the development of health, safety and environmental measures... WTO dispute settlement decision in this area already reflect a considerable degree of deference to domestic regulatory authorities on health and safety matters.”³¹ The US has expressed confidence that “WTO panels will show... deference to U.S. regulators given the integrity, rigor, and open and participatory nature of the U.S. regulatory system.” Clearly this confidence was significantly reinforced by the ultimate outcome of the shrimp/turtle dispute.

But the EU does not share this rather sanguine view of the WTO dispute settlement process, for a steadily increasing number of EU health and environmental regulations either have been or are likely to become vulnerable to

challenges by Europe's partners, including of course the US. The most dramatic example, of course, is the EU's beef hormone ban, which prohibited both the administration of growth hormones to cattle and the sale of any meat from cattle to whom hormones had been administered. The WTO's overturning of the EU's ban on American meat imports from cattle to whom hormones had been administered represented a highly visible challenge to a regulation which the EU and many of its citizens regarded as both important and necessary. The WTO dispute panel certainly showed little "deference" to the EU regulatory process and the American imposition of retaliatory tariffs when the EU refused to remove its ban further increased European dissatisfaction with the WTO dispute settlement process.

Even in the absence of formal dispute proceedings, WTO rules have made EU regulations vulnerable. For example, the EU was forced to modify its politically popular ban on the imports of furs from countries which permitted the use of leg-traps, when it faced the likelihood of a successful legal challenge by the US and Canada. The EU has also found its efforts to develop forest certification schemes that would restrict imports of tropical timber undermined by questions about their consistency with WTO rules. The US has also periodically raised questions about the WTO consistency of the EU's ecolabeling standard for paper products. More recently, US electronic producers, backed by the USTR, have expressed concern about the trade implications of EU's electronic waste directive, which includes phasing out the use of various chemicals in electronic products. And, perhaps most importantly, the EU's restrictions on genetically modified foods and seeds remain an ongoing source of trade tension with the US, with each progressively stricter EU restriction making a legal challenge by the US more likely.

The American experience has been quite different. American fuel economy standards were essentially found to be GATT consistent in a case brought by the EU which was decided shortly before the Uruguay Round Agreement was submitted to Congress. While the first trade dispute adjudicated by the newly formed WTO did declare an EPA rule governing the composition of reformulated gasoline to be WTO inconsistent, the dispute had no substantive implications for American environmental standards. Indeed, the Clinton Administration privately recognized that the US had imposed a trade barrier masquerading as an environmental regulation and was actually pleased with the outcome. American environmentalists did sharply criticize the WTO ruling but were unable to generate much public interest in the dispute. As already noted, the appellate body in the shrimp/turtle essentially endorsed American regulations aimed at protecting sea turtles outside its borders, in effect reversing much of the holding of the tuna/dolphin case.

More broadly, with the exception of the second tuna/dolphin case, the US has never lost an environmentally-related trade dispute with the EU (though the EU did formally support Venezuela in the reformulated gasoline case.). Nor has it even been forced to modify any of its environmental regulations because of fears that the EU might file a formal complaint with the GATT/WTO. Nor do any significant American health, safety or environmental regulations now appear vulnerable to international trade legal challenges from any WTO member, including the EU. It is important to note that since 1994, every trans-Atlantic environmental - related trade dispute between the US and the EU has stemmed from American accusations that EU regulations were NTBs. For a politically influential segment of American producers, the most important health, safety or environmental NTBs are now those imposed by the EU. (Fifteen years ago, the phrase “non-tariff trade barrier” evoked Japan.) Alternatively, for Europeans, it is the US that represents the most important external threat to their ability to maintain their regulatory standards.

Subsidies

Just as the US has begun to challenge the EU’s agricultural subsidies on the grounds that they are environmentally harmful, so has the EU’s defense of them increasingly rested on their environmental as well as social benefits. The EU contends that agriculture makes an essential contribution to the achievement of a number of important social goals beyond the production of food and fiber. The “multifunctional” roles of farming include the preservation and enhancement of the rural landscape, environmental protection and the viability of rural areas. According to the EU, it is important that its support of policies designed to maintain agriculture’s multifunctional role not be compromised by the ongoing efforts of the WTO to reform agricultural policies. While recognizing that the farmed landscape can be harmed by the intensification of agriculture, which presumably trade liberalization might reduce, the EU argues that the “high cultural and nature values of the farmed landscape” can also be harmed by “the marginalisation or abandonment of agricultural land.”³²

In the case of subsidies for fisheries, the EU’s position is more nuanced. While acknowledging that fisheries suffer from the tragedy of the commons, it argues the focus within the CTE on subsidies, particularly those granted to their fleets by developed countries, and their possible effects on over-capacity, is simplistic. For not only is there no clear definition as to what constitutes a subsidy, but in fact the vast majority of developed country support for fisheries was devoted to general services such as infrastructure and research which do not directly contribute to over capacity. Moreover even the removal of subsidies which can be identified as environmentally harmful would have little impact since it would produce an increase in the capacity of unregulated fleets.

Accordingly, “the key to sustainable fisheries lies... in securing... some form of agreement on sustainable fisheries management... which addresses all the factors that have an impact on stocks.”³³

CONCLUSION

Why has the EU identified trade and environment as one of three new areas on which it wants negotiations at the next international trade round, even though the WTO’s dispute settlement decisions have become increasingly responsive to environmental considerations? *The Economist* suggests that it has to do with different trans-Atlantic legal traditions. “Anglo-Saxon may be happy with case law, but politicians in continental Europe, where laws are based on a civil code, like to write rules in advance.”³⁴ Indeed, many of the differences between the EU and the US do have to do with means rather than ends. After all, both want the WTO to be relatively flexible in accommodating a range of environmentally-related trade restrictions. The US, however, believes that such an accommodation is adequately taking place through the decisions of the Appellate Body, while the EU disagrees and wants it to be rule-based.

Yet *The Economist* is only partially correct. For there are also substantive disagreements. The EU is more vulnerable to having its protective regulations challenged through the WTO than is the US. And this in turn reflects the significant changes in regulatory politics that have taken place in Europe and the US over the last decade. The long-standing Congressional impasse over trade and environmental linkages reflects a broader change in the dynamics of health, safety and environmental regulations in the United States. Since the passage of the 1990 Clean Air Act Amendments no significant new environmental legislation has been approved by Congress. Compared to the EU, US environmental policy has been largely stagnant. While the Republican effort to roll-back regulatory standards has been frustrated, neither have Democrats been able to enact any new statutes, though a number of new regulations were issued in the closing days of the Clinton Administration. In the critical area of international environmental policy, the US no longer plays a leadership role: it has ratified neither the Basal Convention on Hazardous Wastes nor the Kyoto Protocol and it only reluctantly signed the Biosafety Protocol. The Bush Administration is highly unlikely to change this pattern.

By contrast, environmental policy in the EU has become increasingly vigorous over the last decade. Fifteen years ago, it was unusual to find an European health, safety or environmental standard which was stricter than its American counterpart. Now there many. These include the EU’s bans on beef and dairy hormones, antibiotics in animal feed and the use of leg-traps, its increasingly rigorous recycling requirements for products ranging from cars to

computers to phones, its extensive eco-labeling schemes, and its wide ranging restrictions on genetically modified foods and seeds. At the global level, it is Europe which has taken a leadership role in seeking to restrict trade in hazardous wastes, protect rain forests, maintain biodiversity and reduce carbon emissions. In short, for a wide variety of reasons including increased public anxiety about food safety, health, safety and environmental issues have become much more politically salient in Europe than in the US.³⁵

It is precisely those EU's regulatory standards which are more stringent than their American counter-parts that are most likely to be subject to trade disputes. (Note however that stringency should not be confused with effectiveness: more stringent regulations may or may not be more effective.) To be sure, domestic pressures in the US that may inhibit the filing of another formal challenge to a politically popular EU health, safety or environmental regulation. After all, the US does not want to provoke a further political backlash against globalization. But for the Europeans, this is insufficient. In addition, according to an EU official, the American position on the Kyoto global climate change agreement has "reverberated into the politics of trade and environment and trade negotiations," making the EU less trustful of the American commitment to environmental protection and thus even more determined to have these issues addressed in the next trade round.³⁶

These differences in the dynamics of regulatory politics in Europe and the US explain why the EU has become much more interested than the US in addressing trade and environmental linkages in the WTO over the past decade, and why many of their policy preferences have become divergent. At the meeting of WTO trade ministers in Doha, Qatar in November 2001, the US did reluctantly agree to support the EU's request that trade and environmental issues such as the relationship between WTO rules and specific trade obligations under existing multilateral environmental agreements be brought onto the negotiating agenda. But on many substantive issues the gap between American and European positions remains substantial.

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ENDNOTES

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³ Quoted in Vogel, op cit, p. 136

⁴ ibid

⁵ quoted in ibid, p. 137

⁶ quoted in William Lash III. *The Clinton Trade Tango: One Step Forward, Two Steps Back* Center for the Study of American Business, May 1984, p. 7

⁷ quoted in *Trading Up*, p. 137

⁸ For an excellent analysis of the politics of the CTE, see, Gregory Shaffer, "The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters," *The Harvard Environmental Law Review*_Vo. 24, No. 2, 2000, pp. 563-592

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¹¹ Preparations for the 1999 Ministerial Conference, A Communication from the United States, 7/30/99

¹² USTR: Declaration of Principles on Trade and Environment

¹³ "Calming the Waters: A Talk with the US Trade Rep," *Business Week* July 23, 2001 p. 41

¹⁴ see for example, Hakan Nordstrom and Scott Vaughan, Trade and Environment, Special Studies 4, World Trade Organization, 1999, Part II: A, E

¹⁵ All quotes in this paragraph are from "Preparations for the 1999 Ministerial Conference,"

¹⁶ Declaration of Principles on Trade and Environment"

¹⁷ "The Non-Trade Impacts of Trade Policy – Asking Questions, Seeking Sustainable Development," Informal Discussion Paper Rev. 1 Directorate General for Trade, EU, January 8, 2001

¹⁸ USTR 2000 Annual Report, p. 81

¹⁹ This section draws on Mark Pollack and Gregory Shaffer, "The Challenge of Food Safety in Transatlantic Relations," in *Transatlantic Governance in the World Economy* Mark Pollack and Gregory Shaffer, eds. New York: Bowman and Littlefield, 2001, pp. 170 - 172

²⁰ "The Non-Trade Implications."

²¹ Quoted in James Cameron, "The Precautionary Principle," in *Trade, Environment, and the Millennium* Gary Sampson and W. Bradnee Chambers, eds. United Nations University Press, 1999 p. 259

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²³ Michael Weinstein and Steve Charnovitz, "The Greening of the WTO," *Foreign Affairs* November/December 2001, pp. 154- 155

²⁴ Elizabeth Olson, "Trade Officials Hope to Clear Air Before Big Meeting," *New York Times* October 13, 2001, p. C2

²⁵ see, for example, Carrie Wofford, “A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT,” *The Harvard Environmental Law Review* Vol. 24, No. 2, 2000, pp. 564 – 592

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²⁷ “The Non-Trade Impacts,”

²⁸ David Vogel, *Barriers or Benefits?* Washington DC, Brookings Institution Press, 1997, p 49

²⁹ Jim Salzman, “Product and Raw Material Eco-Labeling: The Limits for a Transatlantic Approach.”

³⁰ “The Non-Trade Impacts,”

³¹ Declaration of Principles

³² “The Non-Trade Impacts”

³³ *ibid*

³⁴ “Playing games with prosperity,” *Economist* July 28, 2001 p. 26

³⁵ For a broader analysis of this development see, David Vogel, “The New Politics of Risk Regulation in Europe,” A working paper published by the Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, 2001

³⁶ *ibid*